



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 16, 1998

Ms. Linda Wiegman
Supervising Attorney
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR98-0726

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 113673.

The Texas Department of Health (the "department") received a request for information regarding a complaint investigation of Holistic Health and Mind Institute. You claim that portions of the requested information, which you have marked, are made confidential by various state statutes or by the common-law right to privacy and therefore are excepted from required public disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

We observe that some of the submitted information consists of federal HCFA 2567 statements of deficiencies and plans of correction of the mental health facility which were prepared for purposes of a Medicare or Medicaid complaint investigation survey. Federal regulations require the department to release the HCFA 2567 statements of deficiencies and plans of correction, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 (1988) at 5. As the reports are signed by a provider representative and the "provider's plan of correction" portion of the report appears to contain the provider's comments to the report, we believe the provider has had a reasonable opportunity to review and comment on the report. Accordingly, you must release these reports, but with deletions of information that identifies the persons specified in the regulation.

In addition, you ask whether information in the HCFA 2567 forms obtained from medical records must be withheld pursuant to state laws. You ask whether a patient's

diagnosis or medical condition specifically identifies the patient to a certain extent, and thus ask whether the medical information should be redacted from the HCFA 2567 forms. As we have concluded in several previous rulings to the department, we believe that federal law requires the department to release de-identified HCFA 2567 documents. *See* Open Records Letter Nos. 97-2843 (1997), 97-1514 (1997), 97-1492 (1997), 97-1472 (1997), 97-1388 (1997), 97-1230 (1997). In most instances, we do not believe that a patient's medical condition or diagnosis identifies that patient when the name is redacted from the HCFA 2567 forms. As federal provisions govern the public disclosure of the HCFA 2567 forms, we believe that the federal law prevails to the extent it may conflict with the Texas Medical Practice Act and chapter 611 of the Health and Safety Code regarding information obtained from medical and mental health records. *See English v. General Electric Co.*, 110 S. Ct. 2270, 2275 (1990) (state law preempted to extent it actually conflicts with federal law). Furthermore, we believe the de-identification required by federal law is sufficient to protect the privacy interests of the patients.

We now consider whether section 552.101 is applicable to any of the remaining submitted information. Section 552.101 of the Government Code applies to information made confidential by the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *See id.* While common-law privacy may protect an individual's medical history, it does not protect all medically related information. *See* Open Records Decision No. 478 (1987). Individual determinations are required. *See* Open Records Decision No. 370 (1983). We do not find that any of the remaining information is protected by common-law privacy under section 552.101.

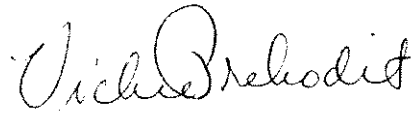
Section 5.08 of V.T.C.S. article 4495b, the Medical Practice Act (the "MPA"), applies to "[c]ommunications between one licensed to practice medicine, relative to or in connection with any professional services as a physician to a patient" and "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." We have reviewed the information submitted to this office. We agree that some of the submitted information comes within the purview of the MPA, and must, therefore be withheld from public disclosure. We have marked the documents at issue accordingly.¹

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous

¹We do not specifically address chapter 611 of the Health and Safety Code because it would not protect any information not already marked as excepted from disclosure under the MPA.

determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch
Assistant Attorney General
Open Records Division

VDP/glg

Ref.: ID# 113673

Enclosures: Submitted documents

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(w/o enclosures)